

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Barry AMMONS,)	No. CV-04-0687-PHX-SMM (ECV)
)	
Petitioner,)	MEMORANDUM OF DECISION AND
)	ORDER
v.)	
)	
Dora SCHRIRO, et al.,)	
)	
Respondents.)	

Pending before the Court is Petitioner Barry Ammons' Petition for Writ of Habeas Corpus. [Doc. No. 1] On May 27, 2005, Magistrate Judge Edward C. Voss filed a Report and Recommendation, advising this Court that Petitioner's Petition should be denied and dismissed with prejudice. [Doc. No. 21] Respondent filed a Motion for Extension of Time to file Objections on July 27, 2005. [Doc. No. 24] This Court granted that Motion on August 1, 2005. [Doc. No. 25] Petitioner filed Objections on August 24, 2005. [Doc. No. 26] After considering Judge Aspey's Report and Recommendation and the arguments raised in Petitioner's Objections thereto, the Court now issues the following rulings.

STANDARD OF REVIEW

The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1)(C); see also Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991). The Court must review the legal analysis in the Report and Recommendation *de novo*. See 28 U.S.C. § 636(b)(1)(C). The Court must review the factual analysis in the Report and Recommendation *de novo* for those facts to which

1 Objections are filed and for clear error for those facts to which no Objections are filed. See id.;
2 see also Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998) (failure to file objections relieves
3 the district court of conducting *de novo* review of the magistrate's factual findings).

4 DISCUSSION

5 Having reviewed the legal conclusions of the Report and Recommendation of the
6 Magistrate Judge, and the objections having been made by Petitioner thereto, the Court hereby
7 incorporates and adopts the Magistrate Judge's Report and Recommendation, with the following
8 addition.

9 The Court finds that the Magistrate Judge adequately addressed all of Petitioner's
10 arguments but one. Petitioner has put forth a claim of "actual innocence." That is, Petitioner
11 argues that even if the statute of limitations has passed, he is "actually innocent" and his
12 constitutional challenges should go forward. In Schlup v. Delo, the United States Supreme
13 Court held that a petitioner "must show that it is more likely than not that no reasonable juror
14 would have found petitioner guilty beyond a reasonable doubt" to prevail on a claim of "actual
15 innocence." 513 U.S. 298, 327 (1995). Petitioner in this case has failed to meet that burden and
16 therefore the Court need not reach a conclusion on whether "actual innocence" is an exception
17 to the statute of limitations for petitions for writs of habeas corpus.

18 CONCLUSION

19 For the reasons set forth above,

20 **IT IS ORDERED** that the Court adopts the Report and Recommendation of Magistrate
21 Judge Edward C. Voss [Doc. No. 21] with the above addition.

22 **IT IS FURTHER ORDERED** that Petitioner's Petition for Writ of Habeas Corpus
23 [Doc. No. 1] is DENIED and this action is DISMISSED WITH PREJUDICE.

24
25 DATED this 5 day of October, 2005.

26
27 
28 Stephen M. McNamee
Chief United States District Judge